GOVERNMENT OF THE STATE OF NEGERI SEMBILAN

v.

YAP CHONG LAN & ORS. & ANOTHER CASE

FEDERAL COURT, KUALA LUMPUR
ABDUL HAMID OMAR CJ (MALAYA)
WAN SULEIMAN FJ
EUSOFFE ABDOOLCADER FJ
[CIVIL APPEAL NOS. 86 & 101 OF 1984]
22 JUNE 1984

LAND LAW: *Lease - Whether licensees had obtained lease for 99 years in respect of lots allocated to them - Whether directory - National Land Code 1965, ss. 48, 64(2), 78(3).*

CIVIL PROCEDURE: *Whether State Government proper party - Equitable estoppel - Whether applicable to public law or private law only.*

The respondents who had been living in houses built by them on land in Rahang Kecil in the Township of Seremban and paying ground rent to Seremban Enterprise Ltd., the registered proprietor thereof, were informed in April 1972 that a portion of the land was acquired by the State Government for a road widening project. The respondents appealed to the Collector for time to vacate and either for low cost houses or state land. They were offered and agreed to accept compensation and lots of land in Ulu Temiang for resettlement. In May 1981 the State Government alienated the land occupied by the respondents to Lesco Development Corporation for a term of 99 years. Lesco was to develop the land and therefore called on all the families including the respondents to quit and deliver up vacant possession and to demolish the buildings erected thereon. Lesco also offered compensation and an option to purchase their low cost housing. The respondents rejected the offer and instituted proceedings to determine whether.

(1) the respondents have acquired an equitable right or interest to remain on the respective lots allocated to them, and

(2) whether the alienation of the land in question to Lesco is bad in law and therefore void.

The Judge of the first instance held that the Collector did intimate to the respondents that they would be allowed to remain on the land on a permanent basis and that they would be given leases for a term of 99 years in respect of the lots allocated to them, and on an application of the doctrine of equitable or promissory or proprietary estoppel, it cannot be denied that the respondents were licensees; of which Lesco had notice which was binding on them. Lesco was therefore ordered to pay monetary compensation.

On the second issue the learned judge held that the alienation of the land to Lesco was not illegal or void as the provisions of s. 64(2) of the National Land Code 1965 ("the Code") were directory, in other words, a mere formality, and non observance thereof did not vitiate the alienation to lesco. The appellants appealed and the respondents cross-appealed.

Held:

[1] That the State Government had nothing to do with the proceedings under the Code and that the proper party to the action was the state authority appointee, the Director of Lands and Mines of the State pursuant to s. 16(2) of the Code.

[2] The provisions of s. 64 of the Code are a mandatory requirement which necessitates compliance before a state land reservation may be rescinded. Since the provisions of s. 64 had not been complied with by the state authority the land had not been properly alienated to Lesco and the respondents.

[3] Reservation of state land can be revoked at any time even retrospectively.

[4] On the facts of the case the Court exercising their discretion refused the declaration that the alienation of the land to Lesco was invalid.

[5] The Collector of Land Revenue had no authority to promise the respondents title to the land they occupied.

[6] The respondents did not have the land alienated to them since the provisions of ss. 48 and 78(3) of the Code had not been complied with.

[7] There can be intervention by equity in the face of specific legislative provisions.

[8] Equitable estoppel only applies to private law and not public administrative law.

[Appeal allowed with costs. Cross-appeal dismissed.]

Cases referred to:
Tan Sri Haji Othman Saat v. Mohamad bin Ismail [1982] 2 MLJ 177
Pow Hing & Anor. v. Registrar of Titles, Malacca [1981] 1 MLJ 155
Ng Yit Seng & Anor. v. Syarikat Jiwa Mentakab Sdn. Bhd. & Ors. [1981] 2 MLJ 194
Thames Water Authority v. Elmbridge Borough Council [1983] 2 WLR 743
Dunkley v. Evans [1981] 1 WLR 1522
Ramsden v. Dyson [1866] LR 1 HL 129
Sidek Hj Muhamad & Ors. v. The Government of the State of Perak & Ors. [1982] 1 MLJ 313; [1982] CLJ (Rep) 321
Pemungut Hasil Tanah, Kota Tinggi v. United Malayan Banking Corporation Berhad [1981] 2 MLJ 264
Newbury District Council v. Secretary of State for the Environment [1981] AC 578
Cudgen Rutile (No. 2) Pty. Ltd. v. Chalk [1975] AC 520
Watson's Bay & South Shore Ferry Co. Ltd. v. Whitfeld [1919] 27 CLR 268
Western Fish Products Ltd. v. Penwith District Council & Anor. [1981] 2 All ER 204

Legislation referred to:
National Land Code Act 56/1965, ss. 48, 64(2), 78(3)

For the appellants (No. 86 of 1984) - Mohd. Ghazali bin Yusoff State Legal Adviser, Negeri Sembilan
For the appellant (No. 101 of 1984) - G. Krishnan and K. G. Chan; M/s. Yazid Baba & Partners
For the respondents - Joseph Chia; M/s. Gunaretnam & Co.

JUDGMENT

Eusoffe Abdoolcader FJ:

These two consolidated appeals, by the Government of the State of Negeri Sembilan and the Commissioner of Lands and Mines, Negeri Sembilan (whose correct designation however should be the Director of Lands and Mines by virtue of the amendment effected by PU (B) 324 of 1970) in Civil Appeal No. 86 of 1984, and Lesco Development Corporation Sdn. Bhd. ('Lesco') in Civil Appeal No. 101 of 1984, relate basically to the claim of the respondents to an equitable right to remain on their respective lots on the land in Ulu Temiang in the Mukim of Seremban on which they have been resettled. The respondents originally had also sued the Collector of Land Revenue, Seremban ('the Collector') and the Registrar of Titles, Negeri Sembilan but at the inception of the hearing in the High Court withdrew the claim against them.

It will be necessary to briefly set out the factual background of this matter, without however requiring any extensive introgression into details as in our view the issues that arise for determination are primarily matters of law. The respondents who were living in houses built by them on some land in Rahang Kecil in the Township of Seremban and paying ground rent to Seremban Enterprise Ltd., the registered proprietor thereof, were informed in April 1972 that a portion of this land had been acquired by the State Government for a road widening project. The respondents then appealed to the Collector for time to vacate and either for low cost houses or State land, and in due course they were asked to attend an inquiry before him which they did with regard to compensation as a result of the acquisition. They were offered and agreed to accept varying amounts by way of compensation and were also allotted lots of land in Ulu Temiang for resettlement. They also appeared before the State Land Committee and it would appear, as the State Legal Adviser conceded in the course of the trial, that the respondents did submit applications for State land in that area. The lots allotted to the respondents were demarcated by wooden pegs and they were permitted by the Collector to build houses on their respective lots and were able to obtain water supply on his recommendation. So much is agreed between the parties but the area of serious dispute between them is whether the respondents were only permitted to stay at Ulu Temiang *pro tempore* as alleged by the appellants or whether, as the respondents contend, they were allowed to reside there permanently with a promise of a State lease for a term of ninety nine years in respect of the lots allocated to them.

In the event not only were the respondents given no title but the land in question occupied by them was alienated to Lesco in May 1981 for a term of ninety nine years. Lesco was to develop the land in question into a housing estate to be known as Taman Muhibbah and accordingly called on the respondents and the other families settled there to quit and deliver up vacant possession of the parts occupied by them and demolish and remove the buildings erected thereon and coupled this with an offer to each of them of compensation and an option to purchase a low cost house in the proposed housing estate at a reduced price and temporary accommodation in the meanwhile. Several other families resettled on the land in question accepted the offer but the respondents adamantly refused and instituted the present proceedings to advance claims against the appellants which raise two main issues for determination, namely, (1) whether the respondents have acquired an equitable right or interest to remain on the respective lots allocated to them, and (2) whether the alienation of the land in question to Lesco is bad in law and therefore void.

This action was heard by Peh Swee Chin J who in a reserved judgment delivered on 25 February 1984 held on the first issue that the Collector did intimate to the respondents that they would be allowed to remain on the land on a permanent basis and that they would be given leases for a term of ninety nine years in respect of the lots allocated to them, and on an application of the doctrine of equitable or promissory or proprietary estoppel, as it is variably termed, that the respondents have at all times been licensees of the land occupied by them coupled with an equity and that Lesco had notice or actual knowledge of the circumstances under which the respondents moved to Ulu Temiang and built their houses on the land in question and that the equity arising in consequence of these circumstances against the other two appellants would therefore be binding on Lesco. To satisfy this equity he ordered Lesco to pay monetary compensation in the sum of RM25,000 to each of the respondents except the 8th and 9th respondents who would jointly receive that amount, and that on such payment the respondents should quit and vacate the land within two months thereafter and made consequential directions for the demolition of their houses and the expenses in connection therewith, awarding costs to the respondents and certifying for two

Counsel. All the three appellants now appeal to this Court against this order and the respondents cross-appeal on the finding of the learned Judge on the second issue that the alienation of the land in question to Lesco is not illegal or void as contended by them on the grounds that the provisions of s. 64(2) of the National Land Code, 1965 ("the Code") are directory or, as he put it, 'in other words a mere formality' and therefore did not vitiate the alienation to Lesco. To obviate prolixity, all references to statutory provisions in this judgment are in respect of the Code unless otherwise specifically stated.

At the inception of the hearing the State Legal Adviser who appeared for the State Government and the Director of Lands and Mines took a preliminary objection to the joinder of the State Government as a party to the proceedings in view of the provisions of s. 16(2). The learned Judge deferred his decision on this point until the conclusion of the trial and in his reserved judgment dismissed it on the grounds that 'because of the various declarations sought against it' the State Government 'should be a proper and necessary party and ought to be heard, for the purpose of completely adjudicating on all the issues herein'. We must with respect say that this is a paralogism as it involves the fallacy of *petitio principii;* it begs the question as there can be no question of any relief being accorded against the State Government if it is not a proper party. The State Government as such has nothing to do with proceedings under the Code. It is the State Authority that is the pertinent entity, and State Authority is defined in s. 5 to mean the Ruler or Governor of the State, as the case may be. Section 12(1) provides for the State Authority to appoint a Director of Land and Mines for the State and sub-section (3) of that section specifies his functions, powers, duties and responsibilities. Section 16 enacts provisions for actions by and against the State Authority, and sub-section (2) thereof specifically stipulates that any action, suit or other proceeding relating to land in which it is sought to establish any liability on the part of the State Authority shall be brought against the Director of Lands and Mines of the State in the name of his office. It is accordingly abundantly clear that the State Government should never have been joined in the proceedings and on the preliminary objection taken it should have been discharged as a party thereto. There appears to be a popular misconception on this aspect of the matter and on the role of the Government of a State as such in relation to the Code with the resultant indiscriminate misjoinder of State Governments as parties in proceedings thereunder, and we expect due heed to be taken of the point we make in this regard.

It might be convenient to first dispose of the second issue - the question of the validity of the alienation of the land in question to Lesco. It would appear from the evidence that the land in question at Ulu Temiang was alienated to Lesco under five titles which comprised part of a larger piece of land which had been gazetted in 1927 as a vegetable garden reserve under s. 9 of the Land Enactment, 1911 which was the precursor to the equipollent provisions of the Code in relation to the reservation of land. Before the land was alienated to Lesco however there had been partial revocation of portions of this reserve by *gazette* notifications between 1951 and 1953 and when this action was heard only four of the five titles alienated contained portions of vegetable garden reserve.

The first matter to consider on this aspect would be the standing of the respondents to complain in this regard. The respondents say they did submit applications for alienation of the land in question to them by way of State leases, and this as we have said earlier is conceded by the State Legal Adviser. This gives them a real or genuine interest in the subject matter of the proceedings instituted which clearly accord them capacity to sue *(Tan Sri Haji Othman Saat v. Mohamad bin Ismail* [1982] 2 MLJ 177 (at pp. 178-179)), but it may well be

proper, when it comes to the question of discretion on a consideration of the substantive application for the declaration sought (and this is a discretionary remedy) as to the validity of the alienation to Lesco, to refuse a remedy to the respondents who, though they may have standing as a matter of jurisdiction, do not merit it (*ibid* at p. 179).

Reserved land is defined in s. 5 to mean land for the time being reserved for a public purpose in accordance with the provisions of s. 62 or of any previous land law, and s. 62(4) provides that reserved land shall not be (a) disposed of by the State Authority except, to paraphrase its provisions, by way of lease for a period not exceeding twenty one years in accordance with the provisions of s. 63 or by way of a temporary occupation licence or a permit for the extraction and removal of rock material as provided for in the requisite provisions of the Code, or (b) used for any purpose other than that for which it is reserved except in pursuance of a disposition made by virtue of any of the provisions referred to in paragraph(a). We pause to observe that 'disposal' is defined in s. 5 to mean any disposal of land made by the State Authority in the exercise of any of the powers conferred by s. 42, and 'State land' is defined therein to exclude *inter alia* reserved land. We would add that the alienation of the five titles to Lesco was made under s. 76 which sets out the meaning of alienation of State land which as we have pointed out excludes reserved land, and 'alienate' itself is defined in s. 5 to mean to dispose of State land. Section 64 makes provision for the revocation of the reservation of any land for a public purpose, and the procedure therefor is strictly stipulated in sub-section (2) thereof.

No revocation of the reserved Land comprised in parts of the four titles alienated to Lesco has in fact been effected under the provisions of s. 64(2) but the learned Judge held that the provisions of this sub-section are directory and not mandatory, that compliance there with in the circumstances of this case would be a mere formality and that the failure to formally revoke the subsisting vegetable garden reserve in the affected portions of the four titles pursuant to the stipulated statutory provisions did not vitiate the alienation of the land in question to Lesco. We must dissent on his conclusion as to the purport and effect of s. 64. The compelling provisions of s. 64 can hardly be said to be merely directory, and the phraseology of the provisions of sub-section (2) thereof clearly connotes a mandatory requirement which necessitates compliance therewith before a reservation can be said to have been revoked. Applying the test laid down in the judgment of this Court in *Pow Hing & Anor. v. Registrar of Titles, Malacca* [1981] 1 MLJ 155 (at p. 157) and even on a consideration of the adhibition of the doctrine of substantial compliance enunciated by this Court in *Ng Yit Seng & Anor. v. Syarikat Jiwa Mentakab Sdn. Bhd. & Ors*. [1981] 2 MLJ 194 (at p. 195), it is clearly manifest that until and unless revocation has been effected under s. 64, reserved land will continue as such, and compliance with this statutory requirement as a prerequisite to revocation cannot be circumvented by treating an essential legislative stipulation as a mere formality.

There are however several other considerations which *ex necessitate rei* enter into the picture. The third respondent who appears from the record as the prime mover in these proceedings and to be the collective voice and mind of the other respondents as well has his house No. 315A standing on a portion of the reserved land in contravention of the specific provisions of s. 62(4) and has hardly therefore any cause for complaint, as what is alleged against Lesco equally redounds on him. On the evidence of a chartered surveyor called by Lesco to testify, the subsisting vegetable garden reserve consists of only forty five acres and after deducting a portion within this which is reserved for the National Electricity Board the remaining affected area would only be seventeen acres. In considering the feasibility of granting a declaration

as to the validity of the alienation to Lesco we have to take this into account and the fact that it would be possible to sever the parts comprising the vegetable garden reserve from the rest of the land alienated *(Thames Water Authority v. Elmbridge Borough Council* [1983] 2 WLR 743, applying *Dunkley v. Evans* [1981] 1 WLR 1522 (at pp. 1524-1525)), and we should point out that the affected area would be comparatively minimal. In any event the reservation can be revoked at any time and even retrospectively, and that this was and is intended to be done is borne out by the evidence of the Acting Director of Lands and Mines who testified that the present proceedings precluded earlier action to this end.

The cumulative effect of the several matters we have adumbrated impel us to exercise our discretion to refuse the declaration sought as to the invalidity of the alienation of the land in question to Lesco. We accordingly affirm but for wholly different reasons the decision of the learned Judge on this issue and dismiss the cross appeal of the respondents with costs.

Adverting now to the primary issue in this matter, *scilicet,* the respondents' claim that they have acquired an equitable right or interest to remain on the respective lots allocated to them, the learned Judge acceded to this contention by applying the doctrine of equitable estoppel propounded in *Ramsden v. Dyson* [1866] LR 1 HL 129 and a concatenation of congeneric cases, and went on to hold that on the facts the respondents were at all times licensees coupled with an equity. It would appear that misguided enthusiasm in claiming and resisting the application of the doctrine of equitable estoppel only generated a dispute on the facts of the matter and blinded all concerned to the necessity of considering its application in the circumstances of this case as a matter of law. No consideration appears to have been given on all sides to the concept of equitable estoppel in the sphere of public law where a statutory or public authority is involved as in the case before us, and when we raised this question Counsel for the respondents merely repeated the submissions he made before the learned Judge and which, we sense, were put forward with rather more hope than confidence.

We have earlier referred to the factual dispute between the parties on this aspect, with the respondents contending that they were permitted to stay there on a permanent basis with a promise of title to the land they occupied and the Director of Lands and Mines denying any such agreement. We indicated to Counsel on both sides that although this aspect and the finding of the learned Judge in favour of the respondents' contention on the evidence adduced form part of the grounds of appeal, we were prepared to assume in favour of the respondents' factual contention in considering the question of law as to the applicability of the doctrine of equitable estoppel in the circumstances, and invited arguments on this basis.

It is necessary in the first instance to consider the authority of the Collector to bind the State Authority in making the commitment alleged by the respondents. He had no authority in our view to purport to commit the State Authority even if he did give the assurances alleged *(Sidek bin Haji Muhamad & Ors. v. The Government of the State of Perak & Ors.* [1982] 1 MLJ 313 (at p. 314)). The State Authority may under the provisions of s. 13 delegate the exercise or performance of any of its powers or duties to the Collector, and on the evidence of the Acting Director of Lands and Mines the Collector has by NSPU No. 19 of 1969 with the concurrence of the District Land Committee only been delegated with authority to approve the conversion of land not exceeding three acres in area for agricultural purposes, and he has no power to alienate land regardless of acreage for housing. Section 48 prescribes that no title to State land shall be acquired by possession, unlawful occupation or occupation under any licence for any period whatsoever, and s. 78(3) provides that the alienation of State land shall take effect upon the registration of a register document of title thereto pursuant

to the provisions referred to in sub-section (1) or (2), and notwithstanding that its alienation has been approved by the State Authority, the land shall remain State land until that time. These statutory provisions by themselves would appear to provide a complete answer to and inhibit the interpolation of any equity in regard to the respondent's claim. There can be no intervention by equity in the face of the specific legislative provisions of the Code *(Pemungut Hasil Tanah, Kota Tinggi v. United Malayan Banking Corporation Berhad* [1981] 2 MLJ 264).

On the matter of the concept of equitable estoppel in public law, we would refer to the decision of the House of Lords in *Newbury District Council v. Secretary of State for the Environment* [1981] AC 578 in which Lord Fraser of Tullybelton deprecated (at p. 606) the introduction of 'an estoppel or bar, personal to the particular party, which is quite inappropriate in this field of law, which is concerned with rights that run with land', and he went on to add that 'to do so would lead to uncertainty and confusion'. Lord Scarman in the course of his speech said (at p. 616):

> In the field of property law, equity is a potent protection of private rights, operating upon the conscience of those who have notice of their existence. But this is no reason for extending it into the public law of planning control, which binds everyone.

and he continued (at p. 617):

> My Lords, I agree with the view so consistently expressed by Lord Parker CJ, that it is wrong to introduce into public administrative law concepts such as equitable estoppel which are essentially aids to the doing of justice in private law.

This case was followed and applied by the English Court of Appeal in *Pioneer Aggregates (UK) Ltd. v. Secretary of State for the Environment & Ors.*, The Times, 20 June 1983.

In *Cudgen Rutile (No. 2) Pty. Ltd. v. Chalk* [1975] AC 520 the Judicial Committee of the Privy Council held that if certain authorities to prospect issued under the Mining Acts of Queensland contained an agreement by the Minister to grant mineral leases, that agreement was not authorised by the statutes which required a series of steps to be taken, decisions to be made and discretion to be exercised, before the Minister was empowered to grant a lease. Fundamental to the decision was the proposition that the Crown cannot contract for the disposal of Crown lands without statutory authority and that the agreement in question was not authorised because it was an anticipatory fetter on the exercise of a discretion which, according to the statute, had to be exercised in the public interest at the end of the prescribed procedure. To the same effect was *Watson's Bay and South Shore Ferry Co. Ltd. v. Whitfeld* [1919] 27 CLR 268 which was referred to with approval and applied in *Cugden Rutile* (*supra*). We would refer again in this context to *Sidek bin Haji Muhamad* (*supra*, at p. 314).

In *Western Fish Products Ltd. v. Penwith District Council & Anor.* [1981] 2 All ER 204 a firm purchased a disused factory for the purpose of manufacturing fish products and incurred expenditure after being told orally on behalf of the local authority's chief planning officer that application for a 'established use' certificate would be 'purely a formality'. The local authority eventually refused the certificate and refused planning permission. The English Court of Appeal held that in any event an estoppel could not be raised to prevent a statutory body exercising its statutory discretion or performing its statutory duty, and therefore, even if the Council's officers while acting in the apparent scope of their authority had purported to determine the plaintiffs' planning application in advance, that was not binding on the Council because it alone had power under the Town and Country Planning Act 1971 to determine the applications. Dismissing the firm's claim, the Court held that there were only

two kinds of exception to the principle that a public authority could not be estopped from exercising its duties and powers. One exception was where it had statutory power to delegate functions to its officers and there were special circumstances to justify the applicant in thinking that the officer thus had power to bind the authority by an irrevocable decision, and the other exception is where the authority waives a procedural requirement relating to some application made to it, whereupon it may be estopped from relying on the lack of formality. Neither of these exceptions apply to the proceedings before us, and in the light of the statutory provisions we have referred to and the authorities we have discussed it would appear that the equity sought to be raised by the respondents would establish against the State Authority rights in respect of State land which it is prevented by statute from creating other than in the prescribed manner.

The application of the doctrine of equitable estoppel and the injection of equity in the circumstances was misconceived and the learned Judge's conclusion on this issue cannot therefore be sustained. The respondents' claim on the primary issue must therefore fail. We accordingly allow this appeal with costs here and in the Court below, set aside the order of the learned Judge and dismiss the respondent's claims for relief in their action. The deposit lodged in Court by way of security will be refunded to the appellants.

Also found at [1984] 2 CLJ 150